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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1948

No. 491

LEE FONG FOOK,
Petitioner,

vs.

I. F. WIXON, District Director, Immigration and Naturalization Service, Port of San Francisco,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred N. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Lee Fong Fook petitions that a writ of *certiorari* issue to review a judgment entered on October 25,

1948, by the United States Circuit Court of Appeals for the Ninth Circuit in a cause pending therein numbered and entitled "No. 11,860, Lee Fong Fook, Appellant, vs. I. F. Wixon, District Director, Immigration and Naturalization Service, Port of San Francisco, Appellee." Said judgment remands the cause to the District Court from which the appeal was taken with directions to vacate the order dismissing appellant's petition for a writ of habeas corpus and to continue the cause until a final determination has been obtained from the Immigration Commissioner.

SUMMARY AND SHORT STATEMENT OF THE MATTERS INVOLVED.

Lee Fong Fook, petitioner, is an adult native-born citizen of California and of the United States. He is a resident of San Francisco, of Chinese lineage. He is a veteran of the recent war holding an honorable discharge from the Army.

After the war he visited China returning to San Francisco with his Chinese bride. The U. S. Immigration and Naturalization Service denied their entry. They were held incommunicado, deprived of access to counsel and refused release on bond.

Thereafter the Immigration Service subjected him to an administrative examination at which he was represented by counsel of his own choosing. At the hearing appellant produced certified copies of the judgment of the California Superior Court in San Fran-

cisco establishing his birth in California (R. 42), the birth certificate issued thereon (R. 41) and his honorable discharge from the Army (R. 43). *Authenticity of these documents was admitted.* Although the Board of Special Inquiry viewed the state judgment as being authentic it, nevertheless, treated it as mere disputable evidence of appellant's citizenship and denied it efficacy on that issue and declared him an alien ineligible for admission.

Petitioner thereupon applied to the District Court below for a writ of habeas corpus to secure liberation from his restraint. There being no disputed factual issue to be decided (R. 25) a hearing was dispensed with and the legal issues resolved against him for the reasons set forth in the District Court's Opinion (R. 26). Although granted temporary release from detention to enable him to prosecute an appeal an unconditional discharge from custody was refused and his petition denied (R. 36) primarily on the ground that the judgment of the Superior Court was not conclusive evidence in his favor.

From that denial the petitioner appealed (R. 37) to the Ninth Circuit Court of Appeals, raising the question of the finality and conclusiveness of the state judgment as a bar to the collateral attack thereon by the Immigration and Naturalization Service and the jurisdiction of the District Court to deny the petition for the writ of habeas corpus and to refuse to discharge him from custody. The Circuit Court, (R. 50-53) declaring that a *resident* excluded at our borders is entitled to a judicial trial of his claim to be a citizen, or-

dered (R. 53) the judgment reversed with instructions to the trial court to continue the cause until the final determination of the administrative proceedings, pointing out that if that was unfavorable to petitioner the trial Court would have the benefit of the final views of the Immigration Commissioner on the effect of the evidentiary showing. Petitioner's petition for a rehearing was timely filed in said Court and denied on November 26, 1948 and its mandate stayed to December 31, 1948, pending docketing of this petition in the Supreme Court and thereafter until this Court passes thereon.

STATEMENT DISCLOSING BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVEW THE JUDGMENT IN QUESTION.

The Supreme Court of the United States has jurisdiction to review the judgment in question under the provisions of 28 USCA, Sec. 347(a).

The Circuit Court of Appeals for the Ninth Circuit had jurisdiction of the appeal from the denial of the District Court of the petition for the writ of habeas corpus and its refusal to discharge the appellant from custody under the provisions of 28 USCA, Sec. 225(a) and Sec. 463(a).

The District Court below had jurisdiction of the proceeding under the provisions of 28 USCA, Secs. 451-453.

QUESTION PRESENTED.

1. Can an authentic final judgment of a California Court establishing the fact of petitioner's birth in California which *ipso facto* demonstrates him to be a citizen of California and of the United States by operation of the 14th Amendment, be subjected to collateral attack by the U. S. Immigration and Naturalization Service, a federal executive agency, which seeks to exclude him on suspicion that he is, nevertheless an alien seeking admission, and that an authentic state judgment is not conclusive but is mere disputable evidence of native born citizenship?

2. When such a citizen is denied admission by our immigration authorities and seeks relief from detention through the medium of a petition for habeas corpus in a federal District Court, must that Court refuse to decide the issue of U. S. citizenship on the merits until such time as there is presented to it the final finding of the Immigration Commissioner and then accept that finding as weighty or controlling evidence on issue of his citizenship?

3. Has the Immigration Service jurisdiction over one whose birth in California has been duly adjudicated by a Court of competent jurisdiction of the State of California?

ASSIGNMENT OF ERRORS AND REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The Circuit Court of Appeals for the Ninth Circuit, has decided an important question of federal

law, in a way in conflict with an applicable decision of the Supreme Court, namely, *Gonzales v. Williams,* 192 U. S. 1, in holding that exhaustion of administrative remedies is a condition precedent to the right to proceed in habeas corpus to relieve from detention where a pure question of law only is involved as distinguished from cases where undecided factual issues are in dispute as also pointed out by this Court in *U. S. v. Sing Tuck,* 194 U. S. 161, 169

2. The Circuit Court of Appeals, in refusing to decide the sole issue presented to the District Court, viz., whether the Immigration and Naturalization Service has authority to subject to collateral attack in an administrative proceeding an admittedly authentic final judgment of the California Superior Court establishing the fact of appellant's birth in California and *ipso facto,* by operation of the 14th amendment, his national citizenship, leaves open to speculation an important question of federal law which has not been, but should be settled by this Court. The Circuit Court of Appeals disposed of this important question *sub silentio* although it was the sole issue involved in the appeal.

3. The Opinion of the Circuit Court of Appeals for the Ninth Circuit herein appears to be at variance and in direct conflict with the rule established in the Second Circuit on July 23, 1947, in *U. S. ex rel. Bradley v. Watkins,* 163 Fed. (2d) 328, 330, and also in the Sixth Circuit in *The Acorn* (D. C. Mich. 1870), 1 Fed. Cas. No. 29, pp. 52, 55, where a final judgment of a State Court in a naturalization proceeding was

held binding and free from collateral attack. At that time a naturalization proceeding was ex parte.

PRAYER FOR THE ISSUANCE OF THE WRIT.

Wherefore, petitioner prays that this Court issue its writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court on a day certain, to be designated therein, a full and complete transcript of the record and all proceedings in the cause numbered and entitled in said Court, "No. 11,860, Lee Fong Fook, Appellant, vs. I. F. Wixon, District Director Immigration and Naturalization Service, Port of San Francisco, Appellee", to the end that said cause may be reviewed by this Court as provided by law, that said judgment of said Circuit Court of Appeals be set aside with instructions to the District Court below to reverse its judgment and discharge the appellant from custody, and that petitioner have such other and further relief in the premises as may be just.

Dated, San Francisco, California,
December 27, 1948.

GUS C. RINGOLE,
Attorney for Petitioner.

Certificate of Counsel

The foregoing petition for writ of certiorari, together with the hereinafter contained supporting brief, is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
December 27, 1948.

Gus C. Ringole,
Attorney for Petitioner.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

IMPORTANCE OF CASE.

Untold thousands of judgments establishing the fact of birth and hence of state and national citizenship have been rendered by the California Courts. If finality and conclusiveness is not to be declared an attribute of those judgments great harm will be inflicted upon the holders of those judgments and chaos will reign as to the rights dependent thereon.

It is in the interest of the Federal Government to have an expeditious determination of the question here presented because numerous cases pend in various executive branches of the government involving the matter of the legal effect of such judgments.

ARGUMENT.

I.

EXHAUSTION OF ADMINISTRATIVE REMEDIES IS NOT A CONDITION PRECEDENT TO MAINTAINING HABEAS CORPUS PROCEEDING WHERE QUESTION OF LAW ALONE IS INVOLVED.

Inasmuch as no factual issues were in dispute in the District Court below, the facts being admitted, appellant was not required to exhaust his administrative remedies by appealing to the Immigration Commissioner before prosecuting habeas corpus proceedings to avoid his detention. In *U. S. v. Sing Tuck,* 194 U. S. 161, 169, this Court stated that exhaustion of administrative remedies was a condition precedent to the institution of a petition for a writ of habeas corpus where factual issues were in dispute but declared the rule otherwise where questions of law only were involved and pointed out that in *Gonzales v. Williams,* 192 U. S. 1, it recognized the right of remedy by petition for the writ without exhausting administrative remedies where only questions of law were involved.

The rule of the *Gonzales* case has been followed in the Second Circuit in *U. S. ex rel. Bradley v. Watkins,* decided July 23, 1947, 163 Fed (2d) 328, 330, and

within the Sixth Circuit since 1870 where the same rule was followed in *The Acorn* (D.C. Mich.), 1 Fed. Case No. 29, pp. 52, 55. The instant decision announcing a contrary rule by the Ninth Circuit Court raises a conflict in decision on the same issue in the Circuits. In consequence, the issue should be finally settled by this Court.

II.

CALIFORNIA IS SOVEREIGN IN ITS DOMAIN AND LEGAL SPHERE.

How National and State citizenship arose.

The Treaty of Guadalupe Hidalgo fixing the boundaries between Mexico and the United States was proclaimed on July 4, 1848. 9 Stat. at Large 922. Article VIII thereof enabled Mexican citizens of California to acquire U. S. citizenship by a simple expression of preference. Those who failed to express a preference within one year were deemed to become U. S. citizens. Residents of California who elected U. S. citizenship and those who did not elect Mexican citizenship within that time thereupon automatically became U. S. citizens. Legality attaches to this method of adopting foreigners as citizens. See *Boyd v. Nebraska,* 143 U. S. 135, 175-176.

On November 13, 1849, a convention of delegates adopted the California Constitution of 1849. At the time California recognized, under the *jus soli,* its inhabitants and voters as its citizens, its voters being those white adult male resident citizens of the United

States and those of Mexico who elected to become U. S. citizens or were blanketed in as such under the Treaty of Guadalupe Hidalgo. See Art. II, sec. 1, Const. of 1849. Thereafter, on September 9, 1850, California was admitted as a State into the Union. *See 9 Stat. at Large, 452, Chap. 50.*

The constitutional guaranties of National and State citizenship.

By a joint resolution of the House and Senate on July 21, 1868, the 14th Amendment which had passed Congress on June 13, 1866, and had been ratified on July 9, 1868, was declared to be a part of the Constitution. As early as 1829, however, it was recognized that a U. S. citizen was also a citizen of the State where he resided. See *Gassies v. Ballon,* 6 Pet. (31 U. S.) 761. The converse also seems to have been true for Mr. Justice Curtis' dissent in the *Dred Scott* decision, 60 U. S. 393 at 576, asserts that "every person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States". Both opinions doubtlessly were based upon the *jus soli* concept derived from the common law of England.

The 14th Amendment guaranteed *national* citizenship to the native-born and to the naturalized and also guaranteed *State* citizenship to the native born and naturalized who were residents of the States.

In 1872 California defined State citizenship with precision in Section 51 of the California Political Code which declares the citizens of the State to be:

"1. All persons born in this State and residing within it, except the children of transient aliens and of alien public ministers and consuls;

2. All persons born out of this State who are citizens of the United States and residing within this State."

In 1879 California adopted its second Constitution.

At the time the U. S. Constitution was adopted residents of the several States, with the probable exception of Indians, slaves regarded as articles of merchandise and aliens refusing allegiance, were considered citizens of the United States. This was not because they were born on American soil for a great many had not been. It was because they were *residents* of the several States and, therefore, the "people" of the new nation. The "people of the U. S." and "citizens" were synonymous terms. See *Dred Scott v. Sandford,* 19 How. (60 U. S.) 393, 404, 15 L. Ed. 691, 700. National citizenship, in fact, then was determined by the individual's State residence, and residents of the States were deemed to be U. S. citizens. See *Minor v. Happersett,* 88 U. S. 21, Wall. 162, 167.

Citizenship by naturalization, although referred to in the Constitution, did not spring into existence until 1790 when Congress enacted the first naturalization statute of March 26, 1790. See 1 Stat. 103. It, too, was made dependent upon residence in this country.

However, until 1868 when the 14th Amendment became a part of the Constitution there was no constitutional provision defining U. S. citizenship by birth.

Dred Scott v. Sandford, supra. Similarly, until the 15th Amendment was adopted the right of a citizen of the United States to vote for Federal or State officers was not defined. Citizens of the United States could not vote for Federal or State officers unless the laws of the States where they resided so provided. See Art. I, secs. 2 and 4, U. S. Constitution. The qualifications for electors were determined by the respective States. The practice and right of the States to determine those qualifications and hence the right to vote for Federal and State officers was recognized by the United States before the 15th Amendment was adopted which guaranteed suffrage against encroachment by the United States and the States. Since then the suffrage qualification practice and laws of the States has continued to be recognized by the United States. The recognition has been based upon the fact that Congress has not legislated on the matter or provided machinery for election of Federal officers and, therefore, leaves this field open to the States to legislate upon without restriction except for discrimination on account of race, color, or previous condition of servitude, prohibited by the 15th Amendment. For like reasons Congress also recognizes the right of the States to provide judicial methods for determining the facts of birth and of the State and national citizenships of their residents.

III.

FACTS RELATING TO BIRTH AND CITIZENSHIP ARE DETERMINABLE BY STATE LAW.

By Section 10600 of its Health and Safety Code enacted in 1939, as amended in 1943, California provides that:

> "* * * any person beneficially interested in establishing of record the fact of birth and the time and place of such birth * * * may file with the county clerk a verified petition for an order judicially establishing the fact of, and the time and place of the birth * * * in either of the following courts.
>
> (1) The superior court of the county in which the birth * * * is alleged to have occurred.
>
> (2) The superior court in the county in which the person whose birth * * * it is sought to be established is residing, * * *."

Under Section 10602 service of a copy of the petition is required to be made upon the District Attorney of the county where the petition is filed together with notice of the time and place of the hearing. The district attorney may appear at the hearing and oppose the petition.

Under Section 10604 which appeared in the 1939 statute publication of notice of the hearing was required but this section was not re-enacted when the statute was revised in 1943. Its deletion was decided upon because during the war proof of birth and therefore, of citizenship, was a prerequisite to employment in a majority, if not all, of our national defense indus-

tries. The publication requirement was causing unnecessary delay in employment in those industries of native born residents who lacked birth certificates because they were born before the State set up bureaus of vital statistics and issued birth certificates or because birth records had been lost or destroyed, as by the great San Francisco fire of 1906. The delay was hampering national defense and war efforts. In furtherance of those national purposes California, in 1943, disposed of the publication requirement to speed up the judicial determination of birth of those lacking birth certificates to enable the nation to utilize their services in those industries.

The proceeding originally was one *in rem* and now is, at least, *quasi in rem* to determine a status of the petitioner. Actual notice is given the State of California by service of process upon and notice of the hearing to the county District Attorney, and an opportunity is given to the State to appear and oppose the petition. In the instant case the District Attorney was served with process and given notice of the time and place of the hearing of appellant's petition. It is to be assumed that his declination to appear and contest the petition was occasioned by the fact that his investigation of the facts convinced him of the truth of its recitals.

The California Superior Court is a Court of record and competent jurisdiction. It had jurisdiction over the status of petitioner and a right and power, under State statute, to determine the facts relating to his nativity from the evidence adduced in favor of the

petition and any that might have been offered against it. The proceeding was not a mere administrative act of issuing a delayed birth certificate which is mere disputable evidence of birth. It was not an *ex-parte* proceeding. It was an *adversary* judicial proceeding. The Court weighed the facts, resolved its findings of fact into a conclusion of law and rendered a formal judgment establishing the fact of appellant's birth in this country. The rendition of that judgment was a judicial act. No appeal was taken and it has become final and conclusive. It no longer is subject to direct attack by appeal and, because of the absence of a want of jurisdiction which would render it void, it is immune from attack in any suit of any type in the same or any other judicial forum whatever except for extrinsic fraud. See *Pico v. Cohn,* 91 Cal. 129, establishing the rule in California and following the Federal rule in *U. S. v. Throckmorton,* 90 U. S. 61. See also *Tinn v. U. S. District Attorney,* 148 Cal. 773, where the States applied the rule of conclusiveness to a State naturalization judgment, and *The Acorn,* 1 Fed. Cas. No. 29, pp. 52, 55, where the rule was applied by a Federal Court to a State naturalization judgment which held such a judgment immune from collateral attack. No attack for extrinsic fraud has been made upon the California judgment in the instant case and no question of extrinsic fraud is involved.

IV.

A STATE COURT JUDGMENT DETERMINATIVE OF FACTS UNDERLYING FEDERAL RIGHTS WHEN FINAL MAY BE REEXAMINED ONLY BY THE UNITED STATES SUPREME COURT.

Only two methods exist whereby a State judgment may be set aside. One is a *direct* attack by a timely appeal through the medium of the State Appellate Courts and thence to a review by the United States Supreme Court in the manner provided by 28 USCA, Sec. 344. The other is through the instrumentality of a *direct* attack in the form of a bill in equity to set aside a final State judgment on the ground that it is void for want of jurisdiction in its rendition. Such a suit necessarily would have to be brought in a Court of the State where the final judgment had been rendered for only State tribunals and the Supreme Court, under 28 USCA, Sec. 344, can acquire jurisdiction to entertain or review the facts upon which the final judgment was based. Neither type of attack has been launched against the State judgment involved herein.

State Courts have jurisdiction and power to determine facts underlying both Federal constitutional and statutory rights. Their determination of the facts upon which their judgments are based cannot be set aside or be disturbed by Federal District Courts and Circuit Courts of Appeals for want of statutory authorization so to do. They are utterly lacking in such jurisdiction. See *People v. Bruce* (CCA-9), 129 Fed. (2d) 421, 423, cert. den. 317 U. S. 710, deciding they have only that jurisdiction which Congress prescribes. The sole Federal tribunal authorized to re-examine

such facts and to render a different judgment is the Supreme Court. See *Powell v. Alabama,* 287 U. S. 45. However, alleged errors of State Courts in cases involving State statutes or State constitutional provisions are not subject to revision even by the Supreme Court. *Hebert v. Louisiana,* 272 U. S. 312. The only jurisdiction that Court may exercise to revise State decisions is in cases where "the federal Constitution was contravened". *Powell v. Alabama,* supra, at page 55, and *Rogers v. Peck,* 199 U. S. 425.

While the above cited cases determine the rule applicable to facts underlying Federal constitutional rights the same rule is applied to findings of fact underlying Federal statutory rights. See *Chicago, M. & St. P. Ry. Co. v. Coogan,* 271 U. S. 472, 474. Even where Congress, by statute, has pre-empted to the Federal government a sphere of jurisdiction which supersedes State laws upon the subject but authorizes the procedural machinery of the State as a proper medium for a determination of a person's rights thereunder the Supreme Court will not extend its review of a decision of the highest State tribunal beyond the point of ascertaining whether the evidence in the record is sufficient, as a matter of law, to sustain the State trial Court's judgment. Beyond this point it has refused to go. See *Chicago, M. & St. P. Ry. Co. v. Coogan,* supra, where the Court reviewed a decision of the Minnesota Supreme Court, involving rights under the Federal Employers' Liability Act, under which Federal and State Courts have concurrent jurisdiction of suits for injuries suffered. See 45 USCA, Sec. 56.

V.

FEDERAL AGENCIES AND COURTS ARE BOUND BY CALIFORNIA LAW.

1. Congress has conceded State power to determine nativity and citizenship status.

Although Congress has prescribed a procedural method whereby a foreign born person may be naturalized it has not prescribed a method whereby the facts relating to the birth of natives may be established and citizenship by birth in this country be determined. There being no federal judicial procedure for such purpose it is evident that Congress intended the States to determine these matters for themselves without involving the United States Courts in needless litigation. The United States therefore impliedly consents to the determination of these facts by procedural methods adopted by the several States and has sanctioned the practice and those methods by recognizing State sovereignty in the matter and the competency of State judicial tribunals to determine such issues.

Similarly, in Title 8 USCA, Sec. 701, Congress has conferred upon State Courts power to naturalize resident aliens. The States may avail themselves of this power or refuse to do so in their own discretion. They do not act as agents of the Federal government in naturalization proceedings but as independent sovereigns. See *In re Fordiani*, 120 A. 338, 98 Conn. 435. Congress is not empowered to set up State appellate machinery for a review of State naturalization decrees and has not attempted to do so. An attempt so to do would constitute an unwarranted interference by the

Federal government with the sovereignty of the States. However, Congress recognizes that the States, in exercise of their own sovereign powers, have the right to prescribe their own methods of appellate review when they appropriate the power to naturalize which Congress has made available. See *Tutun v. U. S.*, 270 U.S. 568, and *In re Bogunovich*, 18 Cal. (2d) 160.

2. Federal Courts lack jurisdiction to entertain suits to determine birth and hence citizenship.

There is "no federal general common law" (*Erie v. Tompkins*, 304 U. S. 64) authorizing a person to sue in a federal court to establish the facts of his birth and, *ipso facto*, his state and national citizenship. At the time petitioner commenced his suit in the California Superior Court to establish his birth there was no method by which he could have brought a suit in a federal Court to establish those matters because of a want of a justiciable controversy and lack of consent by the United States to be sued.

The Declaratory Judgment Statute, 28 USCA, Sec. 400, did not authorize such suit for three reasons, (1) that statute does not enlarge the jurisdiction of the federal Courts but merely provides a remedy in cases of which they already have jurisdiction (*West Pub. Co. v. McColgan* (CCA-9), 138 Fed. (2d) 320; (2) the statute, by its own terms, can be invoked only when an actual justiciable controversy first has arisen and exists, (*Sinclair Ref. Co. v. Burroughs* (CCA-Okla.), 133 Fed. (2d) 536, 538, and (3) neither the statute nor any enabling statute extends the consent of the United States to be sued in any such case. See

Love v. U. S. (CCA-Minn.), 108 Fed. (2d) 43, 50, cert. den. 309 U. S. 673.

Further, the rule is settled that even where federal Courts, by statute, have concurrent jurisdiction over causes with State Courts and a cause has been tried or is pending in a State Court, the federal Courts will refuse jurisdiction on the ground it is vexatious for them to proceed to determine the same issues presented in the State Court. See *Brillhart v. Excess Ins. Co.,* 316 U. S. 491, 495, rehear. den. 317 U. S. 704; *McLain v. Lance* (CCA-Tex.), 146 Fed. (2d) 341, 343, cert. den. 325 U. S. 855; and *Purcell v. Summers* (CCASC), 126 Fed. (2d) 390, Cert. den. 317 U. S. 640.

The Suit To Determine Nationality, Title 8 USCA, Sec. 903, does not authorize a suit to establish birth and citizenship in the absence of an existing controversy but may be invoked only when a right of citizenship first has been denied and an actual controversy exists. When the petitioner filed his suit in the State Court he had not been denied any right of citizenship and, in consequence, a suit to determine his nationality did not lie.

3. Constitution reserves to States the power to determine nativity and citizenship status.

Under our system of distribution of powers between the States and the Union all those powers which are not allotted expressly to the Federal government and not forbidden to the States are exercisable only by the States. As a result whenever the Federal government lays claim to a right to wield a particular power it

first must show affirmatively that the power has been vested in it by the Constitution.

Inasmuch as the States have not delegated to the United States their inherent power to determine the nativity status of their residents this power necessarily is lodged exclusively in the respective States or in the people thereof by the explicit reservation of such power contained in the 9th and 10th Amendments of the Federal Constitution. Impliedly, therefore, or by its silence on the matter and the absence of congressional legislation on the subject, Congress recognizes and concedes the exclusive jurisdiction of the States in this matter.

If a concurrent power were lodged in the United States and the several States to determine the facts of birth and of State and National citizenship the invocation of the power by one of the independent sovereigns and its final decision on such status would preclude the other from independent action thereon if for no other reason than to prevent duplication and multiplicity of lawsuits and finality to any determination thereon and, in consequence, be contrary to public policy. If Federal Courts are to distrust judgments of State Courts simply to satisfy the whims of Federal administrative agencies the judicial machinery of the States and State law have lost efficacy and would be supplanted by Federal caprice.

Federal agencies in California, including the United States District Attorney and the United States Immigration and Naturalization Service, ever have been

aware of the existence, purpose and use of the California statute relating to the establishment of the facts of birth. Any of them could have intervened in those State proceedings if they had desired to do so or become *amicus curiae* therein. The fact that they did not do so in petitioner's case suggests a willingness on the part of the Federal Government to let the matter be determined by the State Court and to abide by its decision.

4. The California law deciding the issue of birth is decisive on petitioner's State and National citizenship and binds Federal Courts.

In the absence of a Federal statute providing a Federal judicial method whereby the facts relating to birth may be established judicially the law of California automatically is invoked within the coordinate Federal district and becomes applicable and controlling on Federal Courts therein by virtue of Title 28 USCA, Sec. 725.

The rule long has been that, except in matters governed entirely by the Federal Constitution or acts of Congress, the law applied in any case is the law of the State, there being "no federal general common law". See *Erie R. Co. v. Tompkins,* 304 U. S. 64, so deciding and also stating that "whether the law of the State shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal concern". See also, *Peterson v. Chicago G. W. R. Co.* (CCA-8), 138 Fed. (2d) 304, holding that Federal Courts must follow the same substantive rule that a State Court would have applied and stating the rule to

be necessary to prevent the accident of diversity of citizenship from disturbing equal administration of justice in coordinate State and Federal Courts sitting side by side.

The right to confer State citizenship lies originally and immediately in the States. There is no statute of Congress depriving the States of the right to determine either State or National citizenship. Neither by the Constitution nor by statute has the United States attempted to reserve to itself the power to determine facts relating to an individual's birth or to determine State or National citizenship. The 14th Amendment contains a guaranty that the States shall not deprive a native-born resident of either type of citizenship. Acting under Section 51 California Political Code a California Court duly determined petitioner to be a citizen of California. The U. S. Constitution, Article XIV automatically conferred United States citizenship upon him.

VI.

THE JUDGMENT OF THE CALIFORNIA COURT IS ENTITLED TO FULL FAITH AND CREDIT ON PRINCIPLES OF COMITY.

Inasmuch as the judgment of the California Court establishing the fact of birth is safe from attack upon its finality and conclusiveness in its own forum it could not be subjected to attack in sister States. *Williams v. North Carolina,* 317 U. S. 287, 294. In accordance with principles of comity made applicable by the full faith and credit clauses of Art. V, Sec. 1,

of the U. S. Constitution the judgment is binding and controlling upon proceedings thereafter commenced in a sister State when a certified copy of that judgment is produced therein.

By Title 28 USCA, Sec. 687 Congress extended the full faith and credit provision of the Constitution to all Federal and State Courts. *Davis v. Davis,* 305 U. S. 32; *People v. Bruce* (CCA-9), 129 Fed. (2d) 421, cert. den. 317 U. S. 710. The effect that a State judgment has in a sister State or a Federal Court depends upon and is precisely that which is given it by the State law where it was rendered. See *Board of Com'rs for Buras Levee Dist. v. Cockrell* (CCA-La.), 91 Fed. (2d) 412, 416, cert. den. 302 U. S. 740; *Stoll v. Gottlieb,* 305 U. S. 165, rehearing den. 305 U. S. 675; and the early case of *Mills v. Duryee,* 7 Cranch 481, 485, 3 L. Ed. 411, 413. Under this status Federal Courts are required to give such a judgment the same full faith and credit that sister States are required to accord and, in consequence, Federal agencies may not deny that faith and credit. The duty to give full force and effect to the Constitution and laws of another State is obligatory. *Smithsonian Institute v. St. John,* 214 U. S. 19, 53 L. Ed. 892, 897. Full faith and credit means that one sovereign accords the judgment of another the same effect that it has in the form of the sovereign where rendered. See *Williams v. North Carolina,* 317 U. S. 287, overruling *Haddock v. Haddock.* The faith and credit that must be given is not fragmentary but full. *Davis v. Davis,* supra.

The full faith and credit clauses of the Constitution and the statute required the Immigration Service and the Court below to give full faith and credit to the judgment of the State Court. They also required them and this Court to take judicial notice of and give effect to Section 51 of the California Political Code which confers State citizenship upon the petitioner. See *U. S. v. Brechtel* (CCA-Ia.), 90 Fed. (2d) 516; *Kaye v. May* (CCA-NJ), 296 Fed. 450.

VII.

A JUDGMENT OF A STATE COURT WHICH HAS BECOME FINAL IS NOT DISPUTABLE EVIDENCE BUT IS CONCLUSIVE EVIDENCE OF ITS RECITALS.

In a hearing before an administrative agency as well as in judicial proceedings a certificate of birth issued by a State executive agency would be mere evidence of the facts relating to birth. It would be evidence of a disputable nature. See *Lee Lung v. U. S.* (CCA-9), 217 Fed. (2d) 48; *Lee Leong v. Patterson,* 186 U.S. 168; and *Lee Choy v. U. S.* (CCA-9), 49 Fed. (2d) 24. However, we are not concerned here with a question of disputable evidence. The dignity of a judgment of a State Court of general jurisdiction, of admitted authenticity cannot be reduced to disputable evidence simply because an administrative agency desires to treat it thus. See the early case of *Mills v. Duryee,* 7 Cranch 481, 483, 3 L. Ed. 411, 412-413, asserting the rule of conclusiveness. The Immigration Service is not empowered to launch a collateral attack

upon a judgment which is the product of State judicial power. A final judgment is conclusive on the material facts which were in issue. A solemn judgment is something far superior to mere evidence of the facts relating to birth and, if viewed as evidence at all, it must be viewed as conclusive evidence of the facts it decides. Such judgment cannot be impeached or ignored by the Immigration Service. Even in direct attacks upon naturalization judgments, brought for the jurisdictional reasons specified in 8 USCA, Sec. 738, Federal Courts can invalidate those judgments only upon satisfaction of the "clear, unequivocal and convincing evidence" rule announced in *Schneidermann v. U. S.*, 320 U. S. 118, 167-168, and *Baumgartner v. U. S.*, 322 U. S. 665. Even that rule of evidence was ignored by the Immigration Service and the District Court below.

CONCLUSION.

For the foregoing reasons we believe that a writ of certiorari directed to the Ninth Circuit Court of Appeals should be granted.

Dated, San Francisco, California,
December 27, 1948.

Respectfully submitted,
GUS C. RINGOLE,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 491

LEE FONG FOOK, PETITIONER

v.

I. F. WIXON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, PORT OF SAN FRANCISCO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 50–52) is reported at 170 F. 2d 245. The opinion of the District Court (R. 26–35) is reported at 74 F. Supp. 68.

JURISDICTION

The judgment of the Court of Appeals was entered October 25, 1948 (R. 53), and a petition for rehearing was denied November 26, 1948 (R. 54). The petition for a writ of certiorari was filed December 31, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The principal question involved is whether judicial consideration of petitioner's application for a writ of habeas corpus should be deferred until final administrative determination of the exclusion proceedings in which petitioner has appealed from a finding by a board of special inquiry that he is an alien ineligible for admission to the United States.

STATUTE INVOLVED

Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885, 887, as amended, 8 U. S. C. 152, 153, provides in pertinent part as follows:

> SEC. 16. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. * * *
>
> SEC. 17. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. * * * In every case where an alien is excluded from admission into the United

States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

STATEMENT

In a petition for a writ of habeas corpus filed on petitioner's behalf in the District Court for the Northern District of California on December 8, 1947, it was alleged that petitioner was born in San Francisco, California, and is therefore a citizen of the United States; that his native birth had been attested by a decree of a California State court on August 14, 1944, in a proceeding brought under provisions of California law;[1]

[1] This decree had been procured pursuant to Sections 10600 *et seq.* of the Health and Safety Code of California (Deering's *California Codes, Health and Safety*), which provide, in relation to births occurring in California at a time when registration was not required by law, as follows:

"§ 10600. * * * any person beneficially interested in establishing of record the fact of and the time and place of, such birth * * * may file with the county clerk a verified petition for an order judicially establishing the fact of, and the time and place of the birth * * * in either of the following courts.

"(1) The superior court of the county in which the birth * * * is alleged to have occurred.

"(2) The superior court of the county in which the person whose birth * * * it is sought to establish is residing; * * *

"§ 10602. At least five day before the date of the hearing, a copy of the petition shall be served upon the district attorney of the county in which the petition is filed, * * *

that he is an honorably discharged veteran of the Army of the United States (see R. 43–44);[2] that he resided in the United States continuously from the time of his birth until January 1947, when he left for a visit to China, returning in August 1947; and that he was denied admission after hearings before a board of special inquiry on the ground that he is not a citizen. The petition asserted that the decree of the California State court is binding and conclusive upon the Immigration and Naturalization Service and that petitioner is therefore entitled to be released from their custody. (R. 2–18.)

A writ of habeas corpus issued (R. 20–21) and respondent filed a return alleging, *inter alia,* that petitioner had indicated his intention to appeal to the Commissioner of Immigration and Naturalization from the order of exclusion made by

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and he may appear at the hearing and oppose the making of the order.

"§ 10605. If, upon the hearing, the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the birth, * * * did in fact occur at the time and place shown by the proofs adduced at the hearing."

A certified copy of the decree of the California court in petitioner's case and a delayed birth certificate issued pursuant to the decree were introduced at the hearing in the district court (R. 41, 42).

[2] Petitioner's certificate of honorable discharge shows that he was in the service for about four months from September 23, 1942, to February 10, 1943, and that he was discharged under the provisions of Section VIII, Army Regulations 615–360 (R. 43–44).

the board of special inquiry and attaching the record of the board (R. 21–22). After the filing of a traverse, in which it was admitted that petitioner intended to take such an appeal (R. 23–26), and a hearing before the district court, the court on January 26, 1948, filed an opinion and order reciting that the board of special inquiry had denied petitioner admission on the ground that he was an alien not eligible for admission, that petitioner was represented by counsel of his own choosing at the several hearings held before the board, that petitioner had entered an appeal to the Commissioner, and that pending such appeal he filed his petition for a writ of habeas corpus. The court rejected petitioner's contention that the decree of the California court is binding under the full faith and credit clause of the Constitution (Art. IV, sec. 1) as extended by statute (28 U. S. C. (1946 ed.) 687, now 28 U. S. C. 1738), and held that the board of special inquiry had authority to determine whether petitioner was eligible for admission and that he was not entitled to a judicial determination of that question. The court also rejected as premature, because the administrative proceeding had not been completed, petitioner's claims that he was denied due process in the hearings before the board. In response to the claim in the petition for a writ of habeas corpus that petitioner was unable because of his confinement to obtain witnesses on his behalf and the prayer for release on bail

pending final determination of his case, the court adverted to petitioner's previous long residence in the United States and concluded both that petitioner should be released temporarily to afford him an opportunity to obtain witnesses to prove, if he could, that he is a citizen, and that the court had authority under the general habeas corpus statute, 28 U. S. C. (1946 ed.) 461, now 28 U. S. C. 2243, to order such release for that purpose. Unconditional release was accordingly refused, but the court continued the matter for determination of the terms and conditions of petitioner's temporary release. (R. 26–35.) However, in its order filed February 6, 1948, the court denied the petition for habeas corpus and remanded petitioner to the custody of respondent, "except that he may be conditionally and temporarily released only, upon posting bond in the sum of One thousand ($1,000) Dollars" (R. 36).

On appeal, the court below declined to consider the merits of petitioner's claim that he is entitled as of right to be released because he is a citizen, pointing out that the administrative determination might ultimately be favorable to him, thus obviating any necessity for recourse to the courts. The court said that the action of the district court in releasing petitioner temporarily on bail to enable him more effectively to pursue his administrative remedy was correct, but held that the district court was wrong in denying the petition for habeas corpus. Accord-

ingly, the cause was remanded to the district court with directions to vacate the order of denial and to continue the cause until final determination of the administrative proceedings. (R. 50–53.)

ARGUMENT

It is indisputable that an exclusion decision of a board of special inquiry is, in the language of the applicable statute, "final, unless reversed on appeal to the Attorney General." 8 U. S. C. 153, *supra*, pp. 2–3. Except for changes not here important, relating to the administrative procedure, this provision has remained constant in all enactments of the immigration laws since 1891. Despite a multitude of challenges, the cases uniformly hold that a claim of American citizenship advanced by one applying for admission does not entitle him to a judicial trial in habeas corpus of the validity of his claim.[3] The right of such a person extends no further than the right to a fair hearing by the administrative agency entrusted with the enforcement of the immigration laws. *Quon Quon Poy* v. *Johnson*, 273 U. S. 352; *Ng Fung Ho* v. *White*, 259 U. S. 276, 282; *Kwock Jan Fat* v. *White*, 253 U. S. 454; *Tang Tun* v. *Edsell*, 223 U. S. 673; *Chin Yow* v. *United States*, 208 U. S. 8, 13; *United States* v. *Ju Toy*,

[3] See, however, Sec. 503 of the Nationality Act of October 14, 1940, 54 Stat. 1171, 8 U. S. C. 903.

198 U. S. 253; *United States ex rel. Medeiros* v. *Watkins*, 166 F. 2d 897 (C. A. 2).[4]

Thus, in the leading case of *United States* v. *Ju Toy, supra*, this Court said (198 U. S. at 262–263):

> It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicil * * *. If, for the

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[4] This is not the rule applicable to all cases coming within the scope of the immigration laws. In deportation proceedings, as distinguished from exclusion proceedings, the subject of deportation is generally said to have a right to a judicial trial *de novo* of any substantial claim of American citizenship. *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149; *Ng Fung Ho* v. *White*, 259 U. S. 276.

In *Carmichael* v. *Delaney*, 170 F. 2d 239 (C. A. 9), to which the court below adverted in its opinion in the present case (R. 52), that court held, on the authority of *Delgadillo* v. *Carmichael*, 332 U. S. 388, that a long-time resident who served in the United States Maritime Service during the war did not make an entry upon his return from service and that therefore the board of special inquiry, whose decision excluding him was affirmed by the Board of Immigration Appeals, had no authority to order his exclusion. In a novel dictum, the court also said that in view of the special circumstances of that case, i. e., Delaney's long residence in the United States, his enlistment in the merchant marine, and his return to resume his residence, he was entitled, as in the case of a deportee, to a judicial trial *de novo* of his claim that he was a native born citizen. In the instant case the court below said that "On the facts here appearing the petitioner is entitled to urge that he occupies the status of a resident" (R. 52). But the court nevertheless required him to exhaust the administrative process before invoking the judicial process.

> purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial.

Petitioner argues, however, that the "sole issue" presented by his petition for a writ of habeas corpus is "whether the Immigration and Naturalization Service has authority to subject to collateral attack in an administrative proceeding an admittedly authentic final judgment of the California Superior Court establishing the fact of [petitioner's] birth in California and *ipso facto,* by operation of the 14th amendment, his national citizenship * * *" (Pet. 6). Accepting petitioner's reliance on this as his sole argument, we think he must fail for several reasons.

Although we believe, as we have pointed out above, that petitioner is not entitled in this proceeding to a judicial trial of the issue of his citizenship, if we are in error in that regard, nevertheless we agree with the court below that an examination of the merits of the petition for writ of habeas corpus should be deferred until final decision of petitioner's administrative appeal from the decision of the board of special inquiry.

It has long been the rule in regard to exclusion proceedings that even within the limited permissible scope of review on habeas corpus, a per-

son excluded must first exhaust his administrative remedies before seeking court review. In *United States* v. *Sing Tuck,* 194 U. S. 161, 168, this Court held that:

> "* * * it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way.",

and at page 170 also said:

> "* * * before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with."

The *Sing Tuck* decision was cited with approval in *Tutun* v. *United States,* 270 U. S. 568, 576–577, for the proposition that:

> [The United States] may provide a legal remedy, but make resort to the courts available only after all administrative remedies have been exhausted.[5]

Petitioner has not exhausted the administrative remedies provided by the statute and the

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[5] The doctrine of exhaustion of administrative remedies before resort to the judicial process is a familiar principle of case law relating to administrative agencies of the Government. *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. The same principle has been affirmatively stated in the Administrative Procedure Act. 5 U. S. C. 1009 (c). See also *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 103.

regulations of the Immigration and Naturalization Service. Although he noted an appeal to the Commissioner, he did not pursue it, but instead filed his petition for a writ of habeas corpus in the district court. The regulations referred to provide for an appeal as of right, not only to the Commissioner (8 C. F. R., Supp. 1947, Part 136), but also, in the event his decision is adverse, to the Board of Immigration Appeals (8 C. F. R., Supp. 1947, Part 90). In addition, the regulations provide for the reopening and reconsideration of cases of exclusion upon the presentation of new or additional evidence. In these circumstances, petitioner's resort to the courts is obviously premature. As the court below said in this regard (R. 52):

> Perhaps the appellate body within the Department, with the aid of such additional evidence as petitioner may be able to present, will reach a conclusion on the facts favorable to the petitioner, in which event no further recourse to the courts would be necessary. If its decision is unfavorable the court will at least have the benefit of the final views of the Department on the effect of the evidentiary showing.[6]

[6] We are advised that petitioner's appeal to the Commissioner has been held in abeyance because of the intervening filing of the petition for habeas corpus. This is in accordance with the established policy of the Service to suspend further administrative proceedings whenever the party af-

Petitioner contends, however, that he need not exhaust his administrative remedies because no issues of fact are involved, but only a question of law, i. e., the effect of the decree of the California state court that petitioner was born in San Francisco. If we accept his contention as to the necessity of exhausting the administrative remedies, so that habeas corpus would be a proper means of reviewing administrative proceedings at an intermediate stage when only a question of law is raised, still we believe petitioner's case falls short on his own hypothesis.

The ultimate question at issue here relates solely to the place of petitioner's birth, whether in the United States or without. That is not a question of law. It is a question of fact, the consideration and determination of which is properly and exclusively within the authority of the administrative agencies provided in 8 U. S. C. 152, 153, as implemented by the provisions for appeal in 8 C. F. R., Supp. 1947, Parts 90, 136. See cases cited at pp. 7–8, *supra,* especially *United States* v. *Ju Toy.*

But petitioner argues that his case does not fall within that rule because the evidence of citizenship which he advanced should have been given, as a matter of law, conclusive effect. That evidence was a delayed birth certificate issued to petitioner in 1944 pursuant to the decree of a

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fected has instituted a judicial proceeding. Thus, petitioner's appeal is still pending.

California state court finding petitioner to have been born in San Francisco. By arguing that such a decree is binding upon the federal courts and agencies in all future actions or proceedings, petitioner seeks to change the central issue from one of fact to one of law and thereby justify his otherwise premature petition for a writ of habeas corpus. In view of our belief that the decree in question is manifestly not binding upon the federal government, its agencies or its court (see pp. 13–15, *infra*), we submit that the question of the place of birth of petitioner is solely a question of fact. To hold otherwise would be an invitation to all persons against whom a preliminary adverse administrative agency ruling had been made, to assert an obviously insubstantial error of law in order to justify an early judicial review that would disrupt the "orderly" administrative handling of the matter.

Conceding, for the purpose of argument only, that petitioner has raised, in his petition for a writ of habeas corpus, an issue of law as to which he is entitled to judicial review at the present stage of the administrative process, we nevertheless urge that such issue must be decided against him.

Petitioner contends that under the full faith and credit clause of the Constitution (Art. IV, sec. 1), as extended by statute to the federal courts (28 U. S. C. (1946 ed.) 687, now 28 U. S. C. 1738), "federal agencies and courts are bound by

California law" as to the determination of United States citizenship, and that it was beyond the authority of the board of special inquiry to go behind the decree of the California court (Pet. 20–28). We believe that the fallacy of this position was effectively exposed in the opinion of the district court (R. 30–31):

> Neither reason nor authority support this contention.
>
> The proceeding authorized by California state law for the establishment of the fact of birth is not an adversary proceeding, save and except that the statute requires that notice of the hearing be given to the District Attorney of the county wherein the hearing is had. The United States not being a party to such proceeding, nor having consented thereto, is not bound by the state court adjudication. Particularly is this so as to the administration of laws of the United States, which it alone enforces (Const. Art. I, Sec. 9, Clause 1.) If the California Court had granted petitioner a decree of naturalization, pursuant to its authority so to do expressly granted by Congress (54 Stat. 1140; 8 USC 701), then of course such a decree would be fully binding on the United States and could only be attacked in the manner provided by Federal Statute (8 USC 738). But jurisdiction to adjudicate the citizenship status of a United States resident has never been conferred by Congress on state courts. Consequently, any state court judgment purporting to exer-

cise that jurisdiction cannot, to that extent, claim of the Federal Courts full faith and credit.

The state court decree establishing birth is no more conclusive upon the United States as to citizenship or as to the right of entry into the United States than would be the finding of a state court in a proceeding between private litigants wherein it might be necessary or proper in deciding property or personal rights to find the date or place of birth of one of the litigants before the court. In my opinion the decree of the state court is evidence of petitioner's birthplace but not conclusive proof of his citizenship. The United States has the full right to inquire into the facts upon which American citizenship is claimed, when entry into the United States is sought; and the burden of proving that citizenship is upon the person seeking entry. If this were not so, the doors would be wide open to fraud upon the part of entrants in the claim of citizenship or fraud in obtaining state decrees as to birth. *Lee Leong* v. *U. S.*, 217 Fed. 48; *Ex Parte Lee*, 49 Fed. 2d 468.[7]

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[7] The trial judge said in a footnote at this point (R. 31):

"The record here shows that the sole witness for the petitioner in the state court proceedings to establish birth, then testified to having seen petitioner immediately after he was born in San Francisco in 1901. This same witness later testified before the Immigration Authorities that he saw petitioner for the first time in 1911 or 1912 when the latter was about three or four years old."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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